Cameron S. Reuber
Peter T Busch
LEASON ELLIS LLP
One Barker Avenue, Fifth Floor
White Plains, New York 10601
Phone: (914) 288-0022
reuber@leasonellis.com
busch@leasonellis.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SMOKO, INC. *Plaintiff,* v. MOON RISE MARKET, LLC. *Defendant.*	Civil Action No.: 1:17-cv-2394 ECF Case

COMPLAINT

Plaintiff Smoko, Inc. ("Plaintiff" or "Smoko"), by and through its attorneys, Leason Ellis LLP, for its Complaint against Defendant Moon Rise Market, LLC ("Defendant" or "Moon Rise"), on personal knowledge as to Smoko's own activities and on information and belief as to the activities of Defendant, allege the following:

NATURE OF THIS ACTION

This is a civil action for willful copyright infringement in violation of 17 U.S.C. § 101 *et seq*. Smoko is the copyright owner of original works of art depicting cartoon unicorns for use on footwear. Defendant uses Smoko's designs in connection with Defendant's promotion and sale of nearly identical products throughout the United States and such use constitutes an

{00624/609554-000/01685860.3}

unauthorized reproduction, display, distribution, publication and utilization of the designs. Smoko seeks, *inter alia*, injunctive relief prohibiting further infringement of its rights to the designs, an award of damages compensating Smoko for the unauthorized use, and the costs of the action awardable under 17 U.S.C. § 505.

THE PARTIES

1. Plaintiff Smoko, Inc. is a California corporation with its principal place of business at 1139 Westminster Avenue, Suite E, Alhambra, California, 91803.

2. Defendant Moon Rise Market, LLC is a limited liability company organized under the laws of Illinois with a principal office at 432 Berkshire Street, Oak Park, Illinois, 60302.

3. Moon Rise, on information and belief, has notified the Office of the Illinois Secretary of State, that its Agent for service of process Thomas P. Garvey, residing at 432 Berkshire Street, Oak Park, Illinois, 60302.

4. Moon Rise, on information and belief, has notified Amazon.com that its counsel, Niro Law Group, LLC, located at 135 S. LaSalle Street, Suite 3025, Chicago, Illinois, 60603, will accept service of process on behalf of Moon Rise.

JURISDICTION AND VENUE

5. This Complaint alleges causes of action under the Copyright Laws of the United States, Title 17 of the United States Code.

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 2201 as well as under Title 17 of the United State Code.

7. The Court has subject matter jurisdiction over the claims alleged herein under 28 U.S.C. § 1332 for diversity jurisdiction, as the parties are citizens of different States and, upon information and belief, the amount in controversy exceeds $75,000.

8. This Court has personal jurisdiction over Defendant pursuant to New York's long-arm statute, NY CPLR § 302(a) because: (1) Defendant has committed, and continues to commit, acts of infringement in the Southern District of New York through solicitation of business, advertising and sale of products online to customers in this district; (2) Defendant has purposefully directed its infringing conduct toward New York residents, which caused and continues to cause harm to Plaintiff who sells its product in New York; and (3) Defendant purposefully directed its activities toward the Southern District of New York when it willfully infringed Plaintiff's intellectual property rights by selling in this district after being on notice as to Plaintiff's claims.

9. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) in that Defendant has committed acts of infringement in this district and is subject to personal jurisdiction in this District.

FACTS COMMON TO ALL COUNTS

10. Smoko is a prominent designer, retailer, and distributor of variety of creatively designed home goods, novelty items, apparel, lamps, bags, books, gadgets and other items. In order to protect Smoko's products against unauthorized reproductions, Smoko routinely applies for and receives copyright registrations for its unique goods.

11. Smoko's original designs are (and have been) sold throughout the United States and within this district; they are the lifeblood of Smoko's business. Indeed, it is the novelty, quality, and distinctiveness of its designs that sets Smoko apart from its competitors.

Smoko's Unicorn Designs

12. Among the assortment of whimsical products that Smoko offers for sale are various unicorn-themed slippers, lamps, and other apparel having a distinctive look and feel as provided by the unicorn design. The history of Smoko's unicorn-themed designs dates back at least to 2015.

13. In particular, Smoko sells a pair of Unicorn Light Up Plush Slippers that applies Smoko's unique unicorn-themed designs to a standard slipper design (the "Slipper Design"). In furtherance of protecting this design, Smoko has applied for, and received registrations Nos. VA 2-022-730 and VA 2-034-064 covering the Slipper Design (collectively, the "Slipper Copyrights").

a. The 2-D Design

14. In or about January 2016, Smoko created an original and creative 2-D work of art of a cartoon unicorn design for use regarding its products (the "2-D Design"). Photographs of the design are attached hereto as **Exhibit A**.

15. Smoko first "published" (as that term is defined in the Copyright Act) the 2-D Design on or about January 30, 2016.

16. The 2-D Design constitutes an original work of authorship and copyrightable subject matter under the laws of the United States, 17 U.S.C. § 101 *et seq*. Smoko is the owner of record of the 2-D Design and owns all right, title and interest therein necessary to independently bring the instant action.

17. Smoko has complied in all respects with the provisions of the copyright law of the United States and has secured all of the rights and privileges in and to the 2-D Design (as well as the copyright therein) necessary to independently bring the instant action.

18. Smoko has duly registered its copyright in the 2-D Design with the U.S. Copyright Office and is the owner of record of U.S. Copyright Registration No. VA 2-022-730 for the 2-D Design, which has an effective date of May 16, 2016. A true and correct copy of the Certificate of Registration for the copyright in this work is attached hereto as **Exhibit B.**

19. All products bearing copies of the work have been sold in conformity with the provisions of the copyright law of the United States and Smoko has fully complied in all respects with the provisions of the U.S. Copyright Act with respect to the 2-D Design.

20. At all times since it created the 2-D Design, Smoko has been, and still is, the exclusive holder of all rights, title and interest in and to the copyright therein.

b. The 3-D Design

21. In or about January 2016, Smoko created an original and creative 3-D work of art of a cartoon unicorn design for use regarding its products (the "3-D Design"). Photographs of the design are attached hereto as **Exhibit C**.

22. Smoko first "published" (as that term is defined in the Copyright Act) the 3-D Design on or about January 30, 2016.

23. The 3-D Design constitutes an original work of authorship and copyrightable subject matter under the laws of the United States, 17 U.S.C. § 101 *et seq*. Smoko is the owner of record of the 3-D Design and owns all right, title and interest therein necessary to independently bring the instant action.

24. Smoko has complied in all respects with the provisions of the copyright law of the United States and has secured all of the rights and privileges in and to the 3-D Design (as well as the copyright therein) necessary to independently bring the instant action.

25. Smoko has duly registered its copyright in the 3-D Design with the U.S. Copyright Office and is the owner of record of U.S. Copyright Registration No. VA 2-034-064 for the 3-D Design, which has an effective date of November 28, 2016. A true and correct copy of the Certificate of Registration for the copyright in this work is attached hereto as **Exhibit D.**

26. All products bearing copies of the work have been sold in conformity with the provisions of the copyright law of the United States and Smoko has fully complied in all respects with the provisions of the U.S. Copyright Act with respect to the 3-D Design.

27. At all times since it created the 3-D Design, Smoko has been, and still is, the exclusive holder of all rights, title and interest in and to the copyright therein.

Moon Rise's Infringing Conduct

28. In or about **November 2016**, Smoko became aware that Defendant was offering for sale on an Amazon.com listing, a unicorn slipper product under the name "Twinkle Tootsies" that was identical in design to the Slipper Design (hereinafter, the "Infringing Product"). The Amazon Standard Identification Number ("ASIN") by which this listing was identified was B01M0EYYVZ. A true and accurate copy of a screenshot taken November 18, 2016 of Defendant's Amazon listing which offered to sell the Infringing Product is attached as **Exhibit E**.

29. Prior counsel for Smoko sent a cease and desist letter to Defendant on or about November 1, 2016, which put Defendant on actual notice as to Smoko's Slipper Design.

30. On or about December 19, 2016, Smoko submitted a first Amazon Rights Infringement Report to Amazon against ASIN: B01M0EYYVZ under a good faith belief that the Infringing Product was an unauthorized reproduction of its Slipper Design and infringed the Slipper Copyrights ("First Amazon Report").

31. On or about December 20, 2016 Amazon notified Smoko that it had reviewed the First Amazon Report and removed the content associated with ASIN: B01M0EYYVZ listing on which Defendant sold the Infringing Product.

32. Upon information and belief, in or about January and February 2017, Defendant contacted Amazon regarding reinstating the Infringing Product listing.

33. Upon information and belief, on or about February 13, 2017, Amazon restored the Infringing Product listing under ASIN: B01M0EYYVZ without contacting Smoko or its representatives. A true and accurate copy of a screenshot of the Infringing Product listing, showing the Infringing Product as being available on February 14, 2017 is attached as **Exhibit F**.

34. Upon information and belief, Defendant resumed selling the Infringing Product on Amazon under the ASIN: B01M0EYYVZ listing at least as early as February 13, 2017.

35. Upon information and belief, on or about February 13, 2017, Defendant began offering to sell and did sell a new version of the Infringing Product for men on Amazon under ASINs: B01N0SQGIT and B01N4FVGB5.

36. Upon information and belief, on or about February 13, 2017, Defendant began offering to sell and selling a new version of the Infringing Product for kids on Amazon under ASINs: B01N6IQYFX.

37. On or about February 21, 2017, Smoko submitted a second Amazon Rights Infringement Report to Amazon under a good faith belief that the Infringing Products being sold at least under ASINs: B01M0EYYVZ and B01N4FVGB5 were an unauthorized reproduction of its Slipper Design and infringed upon its Slipper Copyrights ("Second Amazon Report").

38. On or about February 21, 2017, Amazon notified Smoko that it had reviewed the Second Amazon Report and removed the content associated with the ASIN: B01M0EYYVZ and B01N4FVGB5 listings on which Defendant sold the Infringing Products.

39. On or about March 17, 2017, Defendant filed a counter-notice with Amazon regarding the First and Second Amazon Reports, which was provided to Smoko on March 21, 2017. In this counter-notice, Defendant admitted that Defendant "proceeded with the manufacturing orders, shipping and listing" for the ASINs in the First and Second Amazon Reports with full knowledge of the Slipper Copyrights. A true and accurate copy of this counter-notice is attached as **Exhibit G**.

40. Upon information and belief, at all times since Smoko put the Defendant on notice as to Smoko's Slipper Design in November 2016, Defendant continued to advertise the Infringing Product on social media including Facebook, Twitter, and Instagram.

Claim for Relief
Copyright Infringement under 17 U.S.C. § 101 et seq.

41. Plaintiff repeats and realleges by reference each and every allegation contained in the paragraphs above.

42. Smoko's Slipper Design and Slipper Copyrights have never been dedicated to the public.

43. At all times pertinent to this Complaint, Plaintiff has been, and still is, the owner of all right, title, and interest in and to the Slipper Design and Slipper Copyrights. Smoko has

never assigned, licensed, or otherwise transferred any of these rights, including its copyrights, to Defendant; nor has Smoko ever authorized Defendant to copy, distribute, or license the Slipper Design or Slipper Copyrights.

44. Defendant has directly, vicariously, and/or contributorily infringed Smoko's rights to the Slipper Design protected by the Slipper Copyrights (U.S. Copyright Registration Nos. VA 2-022-730 [2-D Design], VA 2-034-064 [3-D Design]), by reproducing, displaying, or distributing unauthorized copies of the Slipper Design in violation of 17 U.S.C. § 501 *et seq.*

45. Defendant either directly or indirectly, copied Smoko's Slipper Design for its own commercial gain to the unjust exclusion of Smoko.

46. By its acts complained of herein, Defendant has infringed the copyrights in the Slipper Copyrights in violation of §§ 106 and 501 of the Copyright Act, 17 U.S.C. § 101, *et seq.*

47. Defendant's infringement of Smoko's rights in and to each of the copyrighted works each constitutes a separate and distinct act of infringement.

48. Upon information and belief, Defendant knew or should have known that its acts constituted copyright infringement.

49. Defendant's conduct was willful within the meaning of the Copyright Act.

50. Smoko has been damaged by Defendant's conduct, including, but not limited to economic losses. Smoko continues to be damaged by such conduct, and has no adequate remedy at law to compensate Smoko for all the possible damages stemming from Defendant's conduct.

51. Because of the willful nature of Defendant's conduct, Smoko is entitled to an award of statutory damages for each instance of copyright infringement by Defendant, in lieu of recovery of exemplary damages, attorney's fees, and all associated costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests entry of judgment against Defendant finding as a matter of law and fact as follows:

A. Defendant has willfully infringed Plaintiff's rights in the copyrighted designs of the Slipper Design.

B. Defendant, their officers, agents, servants, employees, and attorneys, and all others in active concert or participation with them, including any and all third-party manufacturers, distributors and suppliers who receive actual notice of the Order or Judgment by any method:

i. be permanently enjoined and restrained from copying, reproducing, using, selling, manufacturing, advertising, or promoting copies of the Slipper Design or any design substantially similar thereto;

ii. be permanently enjoined and restrained from copying, reproducing, using, selling, manufacturing, or creating derivative works based upon the Slipper Design or any design substantially similar thereto; and

iii. be ordered to surrender to Smoko all Infringing Products or other garments or materials in its possession, custody or control displaying, copying, and/or bearing the Slipper Design or any design substantially similar thereto.

C. Defendant is ordered to send written notice, approved by the Court, to each licensee, manufacturer, supplier, distributor, wholesaler, retailer, or any other party who manufactured or sold the Infringing Products, or manufactured or sold other products bearing the Slipper Design, with a copy of each such written notice to be furnished to Smoko:

i. requesting that the recipient surrender to Smoko all products bearing the Slipper Design in its possession, custody or control; and

ii. advising the recipient that pursuant to the judgment of this Court, Defendant has been enjoined from copying, reproducing, using, selling, manufacturing, advertising, or promoting copies of the Slipper Design or authorizing any third party to copy, reproduce, use, sell, manufacture, advertise, or promote copies of the Slipper Design.

D. Defendant destroys all Infringing Products, materials, documents, catalogues, or advertisements bearing the Slipper Design in Defendant's possession, custody and control pursuant to 17 U.S.C. § 503.

E. Defendant removes all webpages, web links, photographs or advertisements bearing the Slipper Design from any website that it controls or contributes to.

F. Defendant is required to pay all profits realized by Defendant as a result of its unlawful infringing acts as complained of herein pursuant to 17 U.S.C. § 504.

G. Defendant is required to compensate Smoko for all actual damages suffered as a result of Defendant's unlawful infringing acts complained of herein pursuant to 17 U.S.C. § 504.

H. In the alternative, Defendant is required to pay Smoko statutory damages pursuant to 17 U.S.C. § 504, and said statutory damages shall be in the amount of $150,000 per registration infringed as enhanced as a result of Defendant's willful infringing acts as complained of herein.

I. Smoko be awarded its costs, expenses and reasonable attorney's fees incurred in bringing this action pursuant to 17 U.S.C. § 505.

J. Defendant files with the Court, and serve upon Smoko's counsel, within thirty (30) days after the entry of the judgment, a report under oath setting forth in detail the manner in which Defendant has complied with such judgment.

K. Such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff, pursuant to Fed.R.Civ.P. 38, demands trial by jury on all issues triable to a jury.

Dated: April 3, 2017
White Plains, New York

Respectfully submitted,

By: ______________________________

Cameron S. Reuber (CR 7001)
Peter T Busch (PB 5720)
LEASON ELLIS LLP
One Barker Avenue, Fifth Floor
White Plains, New York 10601
Phone: (914) 288-0022
Fax: (914) 288-0023
Email: reuber@leasonellis.com
Email: busch@leasonellis.com

Attorneys for Plaintiff